Labor Law—Picketing—Constitutional Law—First Amendment Challenges by Federal Employees to the Broad Labor Picketing Proscription of Executive Order 11491

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the First Amendment Commons, and the Labor and Employment Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol69/iss5/8

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
I. INTRODUCTION

In 1967, the White House was picketed by federal employees for the first time in history. Although some 1,700 National Postal Union (NPU) members took part in the peaceful picketing of the executive mansion in protest of what they considered to be "peanut pay raises," no disciplinary measures were imposed upon the NPU or its members. However, one year later, a New York local of the National
Association of Government Employees (NAGE), which engaged in similar peaceful picketing, did not fare as well.

In *National Association of Government Employees v. White (NAGE)*, after an impasse had been reached in collective bargaining negotiations between the Environmental Science Services Administration of the Department of Commerce and the NAGE, twenty-two union members peacefully picketed in front of the building in which they worked as United States weathermen. The members also passed out leaflets to the public that specifically indicated that the members were not on strike. The picketing was performed on the members' own time, and there were no interruptions of any government services. Nonetheless, for the first time in the history of the federal government's labor relations program, sanctions were imposed upon a union.

Mr. Robert White, Administrator of the Environmental Science Services Administration, decided that the NAGE demonstration fell within the "picketing" prohibition of section 3.2(b)(4) of the Code of Fair Labor Practices (CFLP), which prohibited unions from picketing the federal government. As punishment for this violation, he canceled the union's recognition and dues-checkoff rights for a period of one year.

The NAGE then brought suit in the United States District Court for the District of Columbia for a writ of mandamus ordering Administrator White to reinstate the terminated rights on the ground that the disciplinary action constituted a deprivation of the NAGE members' first amendment guarantees. The district court, basing its decision on the doctrine of sovereign immunity, dismissed the suit for lack of jurisdiction. On appeal, the Court of Appeals for the District of Columbia Circuit reversed and

---


5. The leaflets advocated the passage of congressional bills that would grant recognition to federal-employee unions and urged the public to write their Congressmen concerning certain injustices and inefficiencies at the Weather Bureau. 418 F.2d at 1128.


8. 418 F.2d at 1128.

remanded the case for a determination of the merits, holding that
the action did not "founder on any rock of sovereign immunity."\textsuperscript{10}

Although section 3.2(b)(4) of the CFLP has since been displaced
by President Nixon's Executive Order 11,491, "Labor-Management
Relations in the Federal Service,"\textsuperscript{11} the constitutional questions
raised by the \textit{NAGE} situation are still highly pertinent, especially
for the 1,500,000 federal employees who are presently in collective
bargaining units exclusively represented by labor organizations.\textsuperscript{12}
Section 19(b) of the new Executive Order provides, \textit{inter alia}: "A
labor organization shall not . . . (4) call or engage in a strike, work
stoppage, or slowdown; \textit{picket any agency in a labor-management
dispute}; or condone any such activity by failing to take affirmative
action to prevent or stop it . . . ."\textsuperscript{13} This Note will consider the con­
stitutional validity of section 19(b)(4)'s broad prohibition against fed­
eral-employee labor picketing. However, before the first amendment
questions are considered, two preliminary issues should be discussed.

\section*{II. Preliminary Issues}

The district court in \textit{NAGE} based its summary dismissal on the
theory of sovereign immunity.\textsuperscript{14} This jurisdictional doctrine is de­
derived from the historical notion that "the king can do no wrong"
and from the premise that "[t]he interference of the courts with the
performance of the ordinary duties of the executive departments of
the government, would be productive of nothing but mischief."\textsuperscript{15}
Thus, the Supreme Court has consistently held that the courts
have no general supervisory power over the proceedings and ac­
tions of administrative bodies in the government\textsuperscript{16} and that "a
suit against the Government [is one] over which the court, in the
absence of consent, has no jurisdiction."\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{10} 418 F.2d at 1129-30. For a discussion of the district and circuit courts' reasoning,
see text accompanying notes 14-24 \textit{infra}.
\item \textsuperscript{11} 3 C.F.R. 191-205 (comp. 1969). On January 1, 1970, this Executive Order wholly
displaced prior Executive Order 10,988. \textit{See note 3 supra}.
\item \textsuperscript{12} \textit{See G.E.R.R. No. 297, at D1-D6 (May 19, 1969).}
\item \textsuperscript{13} Exec. Order No. 11,491, \textsection\textit{19(b)(4)}, 3 C.F.R. 202-03 (comp. 1969) (emphasis
added).
\item \textsuperscript{14} \textit{See text accompanying note 9 supra}.
\item \textsuperscript{15} Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840).
\item \textsuperscript{16} Keim v. United States, 177 U.S. 290, 292 (1900). \textit{See also Mississippi v. Johnson,
71 U.S. 475 (1867), in which the Court utilized the separation-of-powers rationale to
reach the conclusion that sovereign immunity bars a court from restraining the actions
of either the Congress or the President. For an opposing view, see Justice Brandeis'\textsuperscript{17} dis­
sent in Myers v. United States, 272 U.S. 52, 293 (1926): "The doctrine of the separa­
tion of powers was adopted by the Convention of 1787, not to promote efficiency but to
preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by
means of the inevitable friction incident to the distribution of the governmental powers
among three departments, to save the people from autocracy."}
\item \textsuperscript{17} Larson v. Domestic & Foreign Commerce Corp., 357 U.S. 682, 689 (1949).
\end{itemize}
Although the Court of Appeals for the District of Columbia Circuit had previously relied upon the sovereign immunity doctrine to dismiss similar federal-employee-organization challenges to Government officials' conduct, it concluded that the particular circumstances involved in \textit{NAGE} placed that case within one of the two generally recognized exceptions to the doctrine. The Supreme Court has held that the sovereign immunity rule does not apply when an officer's actions exceed his statutory powers or when the power itself or the manner in which it is exercised is constitutionally void. Under either of these circumstances, according to the Court in \textit{Larson v. Domestic & Foreign Commerce Corporation}, the officer becomes dissociated from the sovereign so that "his actions . . . are considered individual and not sovereign actions." Thus, the suit is viewed as being against the individual officer rather than the sovereign. As a result of this reasoning, the Court has held that sovereign immunity does not bar actions that fall under one of these two exceptions.

The plaintiffs in \textit{NAGE} alleged that Administrator White's actions were unconstitutional because they unduly interfered with the employees' first amendment rights to assemble, to speak freely, and to petition Congress. Accepting such allegations, the court of appeals properly concluded that because the plaintiffs' claim arose under the Constitution, that claim fell under the exception of constitutional invalidity and hence was within the jurisdiction of the federal courts.

---


19. See \textit{Dugan v. Rank}, 372 U.S. 609, 621-22 (1963); \textit{Malone v. Bowdoin}, 369 U.S. 643 (1962). In \textit{Ex parte Young}, 209 U.S. 123, 159 (1908), the Court recognized that the use of the name of the State to enforce an unconstitutional act . . . is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.


21. 337 U.S. at 689.


23. 418 F.2d at 1129.

24. 418 F.2d at 1129. In holding that the plaintiffs had alleged a claim arising under the Constitution, the court emphasized that "even where a privilege that has been
Once the sovereign immunity hurdle is cleared, there are two methods by which the constitutionality of Executive Order 11,491's no-labor-picketing provision might be challenged in the courts. A suit seeking declaratory relief could immediately be brought under the Federal Declaratory Judgments Act, or a challenge could be made following the imposition of disciplinary measures after a labor organization had actually engaged in the proscribed activity. By either method, the suit would best be processed against the Assistant Secretary of Labor for Labor-Management Relations since, under section 6(a)(4) of the Executive Order, he is given the responsibility for the resolution of unfair labor practice complaints.


Despite an allegation of unconstitutional government action, it might still be possible to argue that sovereign immunity should prevent the attainment of satisfactory relief when "the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949). However, in a case involving § 19(b)(4) of Executive Order 11,491, appropriate relief would clearly not require affirmative action to be taken by the sovereign but would instead require only the cessation of illegal action or the reinstatement of an improperly terminated right by a relatively minor Government official—the Assistant Secretary of Labor for Labor-Management Relations, who, under the Executive Order, is responsible for the administration of the unfair labor practice provision. See notes 28-29 infra and accompanying text. For further explication of this aspect of sovereign immunity, see 3 K. Davis, supra, § 27.01 (Supp. 1965).

25. The order could also be challenged in a defense to a suit brought by the Government to enjoin picketing in violation of the order. However, because of the constitutional problems of the order, see pt. V infra, the Government would undoubtedly apply administrative sanctions—such as those invoked in NAGE or even firing—rather than place the order directly in issue in a judicial proceeding.


27. Subject matter jurisdiction is clearly present in either event, for "where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . must entertain the suit." Bell v. Hood, 327 U.S. 678, 681-82 (1946).


29. This concentration of responsibility constituted a change from the practice that had existed under the prior CFLP; that code authorized each separate agency to remedy
Although there is no doubt that a court could entertain a suit by a labor organization that had been disciplined for violating the Executive Order's antipicketing provision, there is a possibility that a court would refuse to grant previolation relief in the form of a declaratory judgment on the ground that the issue was not ripe for determination. In *United Public Workers v. Mitchell*, several federal employees brought suit seeking a declaratory judgment that the Hatch Act, which limited the right of Government workers to engage in political activity, was unconstitutional. Although the employees alleged that their constitutional freedoms were infringed by the threat of punishment under the Act, they had not engaged in any actual conduct that subjected them to disciplinary action. The Supreme Court stated that federal courts do not render advisory opinions. For adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite. The power of courts to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of judicial authority for their protection against actual interference. A hypothetical threat is not enough.

Because of these considerations, the Court dismissed the appeal of the appellants who were seeking declaratory relief. Subsequent cases, however, have greatly undermined the broad doctrine enunciated in *Mitchell* concerning justiciability. In *Dom browski v. Pfister*, for example, the Court was faced with a suit for declaratory relief from an allegedly overbroad state statute that purportedly threatened appellants' constitutional rights to freedom of expression. Although no prosecution had been processed against the appellants under the statute in question, the Court decided that the issue presented was justiciable and held the state law unconstitutional. See *CFLP* § 3.3, Memorandum of May 21, 1963, 3 C.F.R. 853-54 (comp. 1959-1963).

30. In such a case, the disciplinary sanctions would provide the basis for a case or controversy between the union and the agency.
33. 330 U.S. at 89-90. See also 330 U.S. at 90 n.22.
34. While the Court's language regarding ripeness was very broad, it should be emphasized that an additional factor was present in that case. Since one appellant had actually sustained adverse action as a result of his previous political activity, the Court was willing to render a determination of the merits with respect to his appeal. 330 U.S. at 91-94. Had one of the appellants not been in such a position, the Court might not have reached the same result with respect to the undisciplined appellants.
35. 380 U.S. 479 (1965).
36. The Subversive Activities and Communist Control Law, LA. REV. STAT. §§ 14.358-374 (Cum. Supp. 1965), made it unlawful to be a member of a Communist-front organization and to participate in the management of any subversive organization.
In rejecting an argument that the issue was not ripe for determination, the Court said that when statutes have an overbroad sweep . . . the hazard of loss or substantial impairment of those precious [first amendment] rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . ." . . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser. 38

The Court further observed that the threat of prosecutions for protected expression would continue so long as the statute were available to the state and that even the likelihood that such prosecutions would ultimately fail would not mitigate "chilling effect on protected expression." 39 Thus, in light of Dombrowski and other recent cases 40 and of the chilling effect of the order involved in NAGE, it would appear probable that a court would be willing to grant a declaratory judgment to a labor organization concerning the constitutionality of Executive Order 11,491's broad antipicketing provision. 41

However, in a series of cases decided on February 23, 1971, the Supreme Court appeared to restrict the application of the doctrine enunciated in Dombrowski. The Court stated, in Younger v. Harris, 42 "We do not think that [the Dombrowski] opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face"

37. 380 U.S. at 492.
39. 380 U.S. at 494.
40. See also Baggett v. Bullitt, 377 U.S. 360 (1964), in which the Court similarly refused to apply the ripeness doctrine in a declaratory-judgment action challenging the constitutionality of several Washington loyalty oath statutes; NAACP v. Button, 371 U.S. 415, 435 (1965), in which the Court stated, "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute [restricting freedom of expression] lends itself to selective enforcement against unpopular causes."
abridges First Amendment rights." It should be emphasized that each of these cases involved plaintiffs against whom criminal proceedings actually had been initiated in state courts for violations of state statutes and city ordinances. In refusing to uphold or grant injunctions against these state prosecutions on the grounds that such prosecutions would infringe first amendment rights, the Court emphasized its "long-standing public policy against federal court interference with state court proceedings." Since the focus of the Younger group of cases appears to be on the preservation of the integrity of the federal system and of state court proceedings rather than on ripeness, these decisions do not necessarily prevent a federal court from declaring a federal statute or executive order unconstitutional before an actual violation has occurred. Nevertheless, the tenor of the cases suggests that a challenge to Executive Order 11,491 would most wisely be litigated after federal employees had engaged in picketing and had been disciplined—as in NAGE.

III. PRIVATE-SECTOR PICKETING AND THE FIRST AMENDMENT

Once the jurisdictional issues involved in a challenge of Executive Order 11,491, have been decided, the substantive question remains whether that order violates the first amendment. In order to deal properly with this issue, it is necessary to examine the history of the first amendment's protection of picketing and of public-employee conduct. This Note will first discuss the application of the first amendment to labor picketing in the private sector.

During the past thirty-four years, labor picketing has been the subject of a great deal of controversial constitutional analysis. In 1937, the Supreme Court, while upholding the constitutionality of the Wisconsin "little Norris-LaGuardia" anti-injunction act's protection of peaceful labor picketing, recognized that "[m]embers of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." Although this statement by Justice Brandeis had not been made specifically in reference to picketing itself, it was interpreted by many lawyers as implying "that picketing—at least, peaceful picketing—is freedom of speech entitled to the guarantees of the federal Constitution." Actually, such a con-

clusion was not accepted by the Court until 1940 in *Thornhill v. Alabama*.47

*Thornhill* involved a state statute that was interpreted by state courts as rendering peaceful labor picketing a misdemeanor. The Court stated that the first amendment protected the right publicly to discuss public issues and that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."48 It was the Court’s opinion that public streets provide natural places to disseminate information relating to labor disputes and that they do not become inappropriate places merely because such dissemination could take place elsewhere.49 In concluding that the Alabama statute was unconstitutionally broad, the Court emphasized that it had been

applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only that the employer did not employ union men. . . . The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.50

Although *Thornhill* and subsequent cases51 had provided peaceful labor picketing with the protections of the first amendment, it was clear that such protection was not absolute. In *Cantwell v. Connecticut*,52 the Court had declared that "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."53 This reasoning was followed in *Milk Wagon Drivers, Local 753 v.*

47. 310 U.S. 88 (1940).
49. 310 U.S. at 103, 105-06.
50. 310 U.S. at 98-99.
51. In *Carlson v. California*, 310 U.S. 106 (1940), the Court further recognized the free speech aspect of labor picketing by invalidating another overly broad state anti-picketing statute. It noted that "[t]he carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern." 310 U.S. at 112-13. See also *Bakery Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942); *AFL v. Swing*, 312 U.S. 287 (1941).
52. 310 U.S. 256 (1940).
53. 310 U.S. at 308.
Meadowmoor Dairies, Incorporated,\(^54\) in which a broad state court injunction against picketing was upheld due to the pervasive acts of violence that had accompanied the picketing. While the Court recognized that the "[r]ight to free speech in the future cannot be forfeited because of dissociated acts of past violence,"\(^55\) it emphasized that the picketing involved in that case had been "set in a background of violence."\(^56\) The Court therefore concluded that the state could justifiably enjoin future picketing in that particular labor dispute.\(^57\)

In 1942, the Court appeared to diverge more fundamentally from the broad free speech approach to picketing embodied in Thornhill when it upheld a state court injunction of labor picketing issued on grounds other than violence. In Carpenters, Local 213 v. Ritter's Cafe,\(^58\) a union picketed Ritter's restaurant solely for the purpose of protesting his hiring of a non-union contractor to erect an unrelated building \(1 \frac{1}{2}\) miles from the restaurant. The picketing, which caused a cessation of work and deliveries at the restaurant, was found to be for the purpose of forcing Ritter to require the nonunion contractor to employ only union members and therefore to be in violation of the state antitrust law.\(^59\) In upholding the state court injunction against picketing of the restaurant itself, the Supreme Court stated that

> recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication.\(^60\)

Thus, by applying the "unlawful-purpose" doctrine,\(^61\) the Court in Ritter's Cafe appeared to accept the notion that labor picketing constitutes more than "pure speech."

Although the Court had in several instances during the 1940's

\(^{54}\) 312 U.S. 287 (1941).
\(^{56}\) 312 U.S. at 294.
\(^{57}\) 312 U.S. at 294-95.
\(^{58}\) 315 U.S. 722 (1942).
\(^{59}\) 315 U.S. at 723-24.
\(^{60}\) 315 U.S. at 727-28.
\(^{61}\) See Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), in which the Court further developed the unlawful-purpose doctrine by noting that there is no "constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society." 336 U.S. at 501.
upheld state court antipicketing injunctions when a "clear and present danger" of violence or coercion accompanied the picketing\textsuperscript{62} or when the primary purpose of the picketing was the accomplishment of an illegal objective,\textsuperscript{63} it usually adhered to the \textit{Thornhill} premise that peaceful labor picketing was subject to the full protection of the first amendment.\textsuperscript{64} However, by 1950, it was apparent that the Court was having difficulty with the "pure speech" concept and was beginning to re-examine its \textit{Thornhill} doctrine. In \textit{Hughes v. Superior Court of the State of California},\textsuperscript{65} the Court upheld a state court injunction against picketing that had been aimed at forcing local businessmen to hire a minimum percentage of Negro workers; such coercion was held to be in violation of a state antidiscrimination policy.\textsuperscript{66} Although the established unlawful-purpose doctrine clearly covered the situation, the Court utilized the occasion to indicate in dictum its belief that

[Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." ... [T]he very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication.\textsuperscript{67}]

In two companion cases, the Court further emphasized that it did not consider peaceful picketing to be pure speech. In \textit{Teamsters, Local 309 v. Hanke},\textsuperscript{68} while upholding a similar state court injunction against peaceful picketing that interfered with an established state policy, the Court recognized that picketing "cannot dogmatically be equated with the constitutionally protected freedom of speech."\textsuperscript{69} The Court concluded that it had "to strike a balance between the

\textsuperscript{62} See, e.g., text accompanying notes 54-57 supra.
\textsuperscript{63} See, e.g., text accompanying notes 58-60 supra.
\textsuperscript{64} See, e.g., Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943), in which the Supreme Court invalidated a state court injunction against labor picketing despite the fact that the picketing had earlier been accompanied by a few acts of coercion. The Court concluded that "the right to picket itself [cannot] be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing." 320 U.S. at 296.
\textsuperscript{65} 339 U.S. 460 (1950).
\textsuperscript{66} 339 U.S. at 468-69.
\textsuperscript{68} 339 U.S. 470 (1950).
constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' 70 Similar language was used by the Court in Building Service Employees, Local 262 v. Gazzam, 71 in which it also upheld a state court antipicketing injunction by use of the unlawful-purpose doctrine. Thus, it appeared that although Thornhill had not been specifically overruled, its underlying rationale had been significantly eroded. 72

Throughout most of the 1950's, the Court continued to recognize that labor picketing constituted much more than pure speech for constitutional purposes. 73 However, in 1958 the Court demonstrated that it still intended to accord peaceful labor picketing some constitutional protection. In Teamsters, Local 795 v. Newell, 74 the Court in a per curiam decision invalidated a broad state court antipicketing injunction and cited Thornhill v. Alabama. Further evidence of the Court's refusal to reject entirely the Thornhill doctrine was provided

---

69. 339 U.S. at 474.
74. 296 U.S. 541 (1935) (per curiam). See also NLRB v. Drivers, Local 639, 362 U.S. 274 (1960), in which the Court held that peaceful "recognition" picketing does not "restrain or coerce" employees within the meaning of § 8(b)(1)(A) of the National Labor Relations Act [hereinafter NLRA], 29 U.S.C. § 158(b)(1)(A) (1964). That section makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of the rights guaranteed them by the NLRA. Section 8(b)(7) of the NLRA, 29 U.S.C. § 158(b)(7) (1964), now regulates recognitional and organizational picketing. See Smiley &/or Crown Cafeteria v. NLRB, 367 F.2d 561 (9th Cir. 1964), regarding the right of a union to engage in § 8(b)(7) picketing "for the purpose of truthfully advising the public . . . " See also Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 MINN. L. REV. 257, 265-70 (1959).
six years later in NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), a case involving the relationship between peaceful consumer picketing and the prohibition of secondary picketing contained in section 8(b)(4) of the National Labor Relations Act (NLRA). In that case, the Court interpreted the scope of section 8(b)(4) in a narrow manner in order to avoid the constitutional issue that otherwise would have been presented, because it recognized that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." The Court's constitutional struggle with labor picketing continued in Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Incorporated. Although the Court began its analysis in that case "from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment," it noted that prior decisions had recognized that "picketing involves elements of both speech and conduct, i.e., patrolling, and [had] indicated that because of this intermingling of protected and unprotected elements, picketing [could] be subjected to controls that would not be constitutionally permissible in the case of pure speech." However, it emphasized that "no case . . . can be found to support the proposition that the non-speech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether." Since the peaceful picketing involved in Logan Valley was not aimed at achieving an illegal objective, the Court concluded that it was within the protection afforded by the first amendment.

IV. PICKETING BY PUBLIC EMPLOYEES

Although it is clear from the preceding discussion of the relevant Supreme Court decisions that peaceful labor picketing by private-sector employees is entitled to at least some first amendment prote-

75. 377 U.S. 58 (1964).
80. 391 U.S. at 513.
81. 391 U.S. at 514.
82. 391 U.S. at 514-15.
tion, there are special circumstances present with respect to public-sector employees that should be considered. Unlike private-sector employees, whose right to strike is protected by section 13 of the NLRA, federal government employees are prohibited from engaging in work stoppages of any kind. It is highly probable, therefore, that if federal workers were to engage in peaceful picketing in conjunction with an illegal strike, the picketing could be constitutionally enjoined—along with the strike—as being in furtherance of an illegal activity. Conversely, when peaceful labor picketing by federal employees is neither in furtherance of a strike, nor aimed at the achievement of an unlawful objective, it may be contended that such activity should be afforded greater first amendment protection than is afforded most private-sector labor picketing. Although private-sector labor picketing is at least partially communicative in nature, it is frequently used as a "signal" to induce fellow union members to cease doing business with the picketed employer. Because federal employees may not legally utilize picketing for such purposes, they are restricted to engaging in only pure informational picketing. Consequently, such activity more closely resembles nonlabor picketing than labor picketing. It may therefore be contended that the constitutional protection afforded their activity should be determined by reference to Supreme Court decisions that have involved nonlabor picketing.

Although the Court has applied the unlawful-purpose doctrine to some areas of nonlabor picketing when the governmental interest being protected was substantial, the Court has often provided greater constitutional protection for this type of picketing than for labor picketing. For example, in Edwards v. South Carolina, the Court overturned a state breach-of-peace conviction of 187 blacks who had engaged in peaceful informational picketing at the South Carolina Statehouse in protest of racial segregation. The Court

86. See NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). See also Cox, 48 MICH. L. REV. 767, supra note 72, at 787-93; Cox, 4 VAND. L. REV. 574, supra note 72, at 591-602.
87. See note 84 and text accompanying note 85 supra.
88. See text accompanying notes 58-60 supra.
91. 372 U.S. at 237.
emphasized that the demonstration involved no violence or threat of violence on the part of either the demonstrators or the white onlookers and that there was ample police protection. In holding that a conviction under these circumstances could not stand—despite the volatile nature of racial demonstrations in the South—Justice Stewart, speaking for the majority, observed that the Constitution "does not permit a State to make criminal the peaceful expression of unpopular views." The Court then quoted extensively from *Terminiello v. Chicago*:

>[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas, either by legislatures, courts, or dominant political or community groups.

Since the atmosphere surrounding peaceful nonstrike informational picketing in a public-employee labor dispute is normally far less volatile than that which surrounded southern racial demonstrations

---

92. 372 U.S. at 235-36.
93. 372 U.S. at 237.
94. 337 U.S. 1, 4-5 (1949). In *Terminiello*, the Court set aside a breach-of-peace conviction of a speaker who "vigorously, if not viciously" criticized certain political and racial groups. Demonstrators outside the auditorium in which the defendant spoke had reacted by tossing stink bombs, breaking windows, and trying to tear clothes off members of the audience.
95. 372 U.S. at 237-38. See *Henry v. City of Rock Hill*, 376 U.S. 776 (1964). See also *Note, Labor Relations in the Public Service*, 75 Harv. L. Rev. 391, 411 (1961), in which it is urged that purely informational picketing by public employees should "fall within the constitutional protection of free speech and of the right to petition the government for redress of grievances."

during the early 1960's, it seems clear that the approach adopted in Edwards protects both forms of picketing.

The Edwards approach strongly indicates that federal employees should be at least afforded the constitutionally protected right to engage in peaceful informational picketing in order to bring the pressure of public opinion to bear on their labor dispute when economic weapons—such as strikes—are unavailable. Nevertheless, it may be argued that by accepting employment with the Government, federal employees forfeit such a privilege. In United Public Workers v. Mitchell, a case concerning the constitutionality of the Hatch Act's prohibition of federal employees from engaging in political activity, the Court observed: “Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required.” The Court therefore upheld the constitutionality of the Hatch Act restrictions. In Adler v. Board of Education, the Court upheld against similar constitutional attack the New York Feinberg Law, which required loyalty oaths of school teachers. Although the Court asserted in Adler that such public employees “have no right to work for the State in the school system on their own terms,” it subsequently stated, in Wieman v. Updegraff, that “constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.” But, despite the language used by the Court, more recent decisions seem to indicate that when the efficiency

96. See, e.g., McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), which upheld the discharge of a policeman for engaging in prohibited political activity. The court noted: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” See also Ex parte Curtis, 106 U.S. 371 (1882), which upheld a similar restriction on the rights of certain federal employees.


99. 330 U.S. at 103.

100. 330 U.S. at 103.


103. 342 U.S. at 492. The Court commented that persons “may work for the school system upon the reasonable terms laid down by the proper authorities of New York.” 342 U.S. at 492. See also Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), affd. per curiam by equally divided Court, 341 U.S. 918 (1951).

104. 344 U.S. 183 (1952).

105. 344 U.S. at 192.
or integrity of the public service is involved, it will permit some restriction on the constitutional rights of the public employees involved.

In *Keyishian v. Board of Regents of the University of the State of New York*, the Court severely restricted the right of a state to abridge, through loyalty oath requirements, the first amendment rights of public employees. In holding that a state could not dismiss a state university professor merely for his knowing membership in the Communist Party without a showing of specific intent to further the party's unlawful aims, the Court noted that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." The implication in this statement that some reasonable restrictions on the rights of public employees would be constitutionally permissible was fortified in *Pickering v. Board of Education of Township High School District 205*. Although the Court in that case purportedly rejected the notion that public employees may constitutionally be required to waive rights of free speech enjoyed by private citizens, it recognized that

the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Thus, despite the fact that the Court is willing to permit some restrictions on the constitutional rights of public employees when dictated by the requirements of efficiency and integrity, it is clear that it will not tolerate unreasonable infringement of fundamental freedoms. In *Pickering*, for example, the Court found that the activity that had been engaged in—writing a letter to a local newspaper criticizing the way the school board and superintendent had handled proposals to raise school revenue—had interfered with neither the performance of the public employee's duties nor the general operation

107. 385 U.S. at 606-10.
110. 391 U.S. at 568.
111. 391 U.S. at 564.
of the public service. It concluded that in such circumstances, "the interest of the ... administration in limiting [the public employee's] opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." Therefore, the Court held unreasonable the infringement of the employee's first amendment rights.

V. The Constitutional Validity of Executive Order 11,491

With this background of the applicability of the first amendment to picketing and to public employees in mind, the reasonableness of Executive Order 11,491's broad antilabor picketing provision may properly be considered. The language of section 19(b)(4) of the order clearly prohibits all labor picketing of Government agencies; it is not confined to situations either where there is a "clear and present danger" of disruption of the public service or where the picketing is intended to achieve an illegal objective. Thus, even accepting the narrow premise that peaceful labor picketing involves more than free speech, it is submitted that Executive Order 11,491's provision is unreasonably restrictive.

In United States v. O'Brien, the Court recognized that when an individual's conduct involves both speech and nonspeech elements, first amendment freedoms may be incidentally restricted if the government has a strong interest in regulating the nonspeech element. The Court stated that such regulation is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no

112. 391 U.S. at 570-75.
113. 391 U.S. at 572-73. See also Tinker v. Des Moines Independent School Dist., 393 U.S. 508 (1969), which involved the right of school authorities to restrict the free expression of pupils. The Court commented in that case that "where there is no finding and no showing that the exercise of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." 393 U.S. at 509.
114. 391 U.S. at 574-75. See also Muller v. Conlisk, 429 F.2d 901, 902 (7th Cir. 1970) (Chicago Police Department rule prohibiting police from "[e]ngaging in any activity, conversation, deliberation, or discussion which is derogatory to the Department or any member or policy of the Department" held unconstitutionally broad); Melton v. City of Atlanta, 39 U.S.L.W. 2469 (N.D. Ga. Feb. 5, 1971) (Georgia state statute prohibiting policemen from joining a labor union held unconstitutional under first and fourteenth amendments).
115. See text accompanying notes 52-57 supra.
116. See notes 55-60 supra and accompanying text.
117. 391 U.S. 367 (1968). In this case, the Court upheld convictions under federal law of three young men for burning their draft cards.
118. 391 U.S. at 376.
greater than is essential to the furtherance of that interest." This statement is consistent with the well-established doctrine that a legitimate and substantial governmental purpose cannot be pursued by means that unnecessarily abridge fundamental first amendment liberties; such an abridgment offends the Constitution if the governmental purpose that it is intended to further could be accomplished through less drastic means.

It is not contended that restrictions on federal-employee labor picketing may never be imposed; indeed, an Executive Order could properly be drafted that would prevent the utilization of labor picketing either to disrupt governmental services—as is already prohibited by existing law—or to aid in the achievement of an illegal objective. However, it is submitted that such specific restrictions would sufficiently protect government interests to render unnecessary—and hence constitutionally impermissible—an order prohibiting all federal-employee picketing. A narrow order, which would prohibit disruptive and unlawful-purpose picketing, would prevent picketing by federal employees pursuant to unlawful strikes but would allow nondisruptive informational picketing such as that involved in NAGE. Since a narrow order would accomplish the Government's interest in "promoting the efficiency of the public services," the broader Executive Order 11,491—which unnecessarily restricts federal employees' first amendment rights to freedom of expression—is "greater than is essential to the furtherance of that interest" and is therefore unconstitutional.

There is yet another reason why the right of federal employees to engage in peaceful labor picketing that does not seek the achievement of an unlawful objective should not be restricted. When federal workers are dissatisfied with their present working conditions they must look to their employer—the federal government—for

119. 391 U.S. at 376-77.
122. See note 61 and text accompanying notes 58-60 supra.
123. See text accompanying notes 4-5 supra.
proper redress of their grievances. A century ago, in *United States v. Cruikshank*, the Court recognized:

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

Although it might be argued that the constitutional right to petition the government for a redress of grievances was not intended to apply when there is an employee-employer relationship between the petitioner and the federal government, it is submitted that such a conclusion would impose an unreasonable "second-class" citizenship upon such employees. This proposition is supported by the Supreme Court's statement in *Pickering v. Board of Education* that a government's interest in limiting a public employee's right to exercise nondisruptive freedom of expression is no greater than its interest in limiting the similar rights of private citizens. It should also be emphasized that by permitting federal employees to petition the Government—i.e., their employer—through resort to peaceful informational picketing for redress of labor grievances, the general public may be benefited since the possible expedient alleviation of the conditions that are disturbing the employees will best insure the smooth and efficient operation of the public service.

The Supreme Court recently stated in *United States v. Robel*:

For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense,
we would sanction the subversion of one of those liberties . . .
which makes the defense of the Nation worthwhile.132

It would similarly be ironic if the Government were permitted to
stifle the free expression of its employees in order to prevent its being
embarrassed in the eyes of public opinion by federal-employee picketing. Yet this is apparently the principal—if not the only—objective
achieved by the very broad labor picketing prohibition contained
in section 19(b)(4).133

In conclusion, it is submitted that section 19(b)(4) of Executive
Order 11,491 clearly exceeds the bounds of reasonable regulation,
thereby impermissibly infringing the first amendment rights of
Government workers. Therefore, a federal court should not hesitate
to take jurisdiction over a federal-employee union's challenge of that
order and to provide the relief required in order fully to protect the
fundamental rights of Government employees.

133. As was demonstrated by the NAGE employees in New York City, there need be
no disruption of the public service when federal workers engage in peaceful picketing.
See notes 4-5 supra and accompanying text.